United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, and KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD MCGRATH, Attorney General's Office, Department of Justice, Washington, D. C., *Defendant.*

STATEMENT AS TO JURISDICTION.

The Solicitor General, on behalf of the defendant-appellant, J. Howard McGrath, or, in the alternative, his successor in office, James P. McGranery, or, in the further alternative, the United States,[1] and in compliance with Rule 12 of

[1] The appeal is being taken in this form in order to safeguard the interest of the Government in obtaining review and reversal of the judgment of the district court holding unconstitutional the Federal Regulation of Lobbying Act. Defendant McGrath resigned as Attorney General of the United States on April 7, 1952, prior to the entry of the district court's judgment against him on May 2, and was succeeded in office by James P. McGranery on May 27, 1952. In

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the Rules of the Supreme Court of the United States, as amended, submits herewith a statement

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our view, Mr. McGrath has standing to take this appeal and to urge reversal of the judgment or its vacation on the ground of mootness (as he urged in the district court). However, if Mr. McGrath's resignation is regarded as precluding him from taking this appeal (cf. *Davis* v. *Preston*, 280 U.S. 406), it is respectfully requested and moved that the appeal be deemed taken on behalf of Mr. McGranery, the present Attorney General, and that the latter be substituted as appellant in place of Mr. McGrath. Such substitution, if necessary, is requested solely in order to preserve the Government's right of appeal. The request in no way concedes or implies that Mr. McGranery has threatened or is threatening to institute criminal prosecutions against either or both appellees for violations of the Act, or that the allegations or findings in the district court relating to Mr. McGrath or Mr. Clark are applicable to Mr. McGranery.

The Solicitor General also requests and moves, in the further event that neither Mr. McGrath nor Mr. McGranery is deemed a proper party appellant, that this appeal be considered as taken on behalf of the United States, which, under 28 U.S.C. 2403, has the right to intervene in "any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question * * *." As intervenor, the United States has all the rights of a party, including the right to appeal. Such intervention of the United States in this case as appellant would be solely to vindicate its concern that a decision of a district court invalidating an Act of Congress affecting the public interest, which would otherwise be non-reviewable for lack of a proper party appellant, should not stand unreviewed or, if that is the proper procedure, be vacated on the ground of mootness. Where Congress has given the right of appeal, the losing side is entitled to an appellate decision, if only an order vacating the judgment as moot. Cf. *United States* v. *Munsingwear*, 340 U.S. 36, 39-41.

showing the basis of the jurisdiction of the Supreme Court to review on appeal the final judgment entered by the district court in this case.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia, dated March 17, 1952, is reported at 103 F. Supp. 510. Copies of that opinion and of the final judgment entered on May 2, 1952, are attached hereto as Appendix A.

JURISDICTION

The judgment of the district court was entered on May 2, 1952. Petition for appeal was presented to that court on May 28, 1952.[2] The suit was brought to enjoin enforcement of the Federal Regulation of Lobbying Act as unconstitutional, and was tried before a statutory three-judge district court specially convened pursuant to 28 U.S.C. 2282. The jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by 28 U.S.C. 1252 and 1253.

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[2] The judgment was entered on May 2, 1952 to take effect *nunc pro tunc* as of March 17, 1952. Under 28 U.S.C. 2101(a), the appeal must be taken within 30 days after "the entry" of the judgment. The thirty-day period in this case began to run as of the date of actual entry of the judgment, and not as of the date to which the judgment was attempted to be made retroactive. *Seymour* v. *Freer*, 5 Wall. 822; *United States* v. *Gomez*, 1 Wall. 690, 699-700; see Rule 58, Fed. Rules of Civil Procedure.

STATUTE INVOLVED AND QUESTION PRESENTED

The full text of the Federal Regulation of Lobbying Act (60 Stat. 812, 839; 2 U.S.C. 261 *et seq.*), which was enacted as Title III of the Legislative Reorganization Act of 1946 (60 Stat. 812), and the full text of that Act's separability clause, are attached hereto as Appendix B. The Lobbying Act neither prohibits lobbying nor limits the amount of money that may be expended in lobbying, but simply requires that certain records be kept and that quarterly financial statements be filed. These disclosure requirements are, in general, made applicable by Section 307 of the Act to any person collecting or receiving money "to be used principally to aid, or the principal purpose of which person is to aid, in . . . influenc[ing], directly or indirectly, the passage or defeat of any [federal] legislation . . .". Section 310(a) makes violation of any of the disclosure requirements a misdemeanor, punishable by fine or imprisonment, and Section 310(b) prohibits, for a period of three years, any person convicted of such a misdemeanor "from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation."

The principal questions presented are:

1. Whether the provisions of Section 307 are so vague and indefinite as to violate the due process clause of the Fifth Amendment.

2. Whether Section 310(b)'s prohibition violates the rights of freedom of speech and of petition under the First Amendment.

3. If the preceding question be answered in the affirmative, whether the unconstitutionality of that prohibition invalidates the entire Act despite the applicability of the separability clause to the Act.

4. Whether the district court erred in reaching and deciding the constitutional issues without first deciding the non-constitutional question, *i.e.*, whether the Lobbying Act applies to the appellees.

5. Whether this proceeding was moot or abated at the time of entry of the district court's judgment and is now moot or abated, and whether the judgment should be vacated or reversed as moot or abated.[3]

STATEMENT

This action was instituted by the National Association of Manufacturers of the United States (N.A.M.) and Kenneth R. Miller, its Treasurer and Business Manager, "against the Attorney General of the United States to enjoin him from instituting prosecutions against them for violations of the Federal Regulation of Lobbying Act" (Opinion, Appendix A).

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[3] In addition to these questions, all of the additional points raised in the Assignment of Errors filed herewith are also presented by this case.

The complaint, filed January 28, 1948, named as defendant "Tom C. Clark, Attorney General's Office, Department of Justice, Washington, D. C." It sought to enjoin enforcement of the Act on the grounds that it is inapplicable to the appellees, N.A.M. and Miller, and that, even if applicable, it is unconstitutional. A three-judge district court was convened to hear the case as required by 28 U.S.C. 2282.

On March 7, 1949, the district court denied Mr. Clark's motion to dismiss based on the grounds that there was no justiciable controversy and that there was an adequate remedy at law and hence no equitable jurisdiction. Mr. Clark then answered and on June 6, 1949, moved for summary judgment on the grounds that he had not threatened to enforce the Act against the appellees and that the Act is constitutional.

Before this motion was decided, and on August 24, 1949, J. Howard McGrath succeeded Mr. Clark as Attorney General. A motion to dismiss the action on the ground that it had abated upon his resignation was filed by Mr. Clark but denied by the court on February 7, 1950. Appellees then moved to substitute Mr. McGrath for Mr. Clark and for leave to file a supplemental complaint.

In March, 1950, appellees' motion was granted, and defendant McGrath answered the supplemental complaint, denying that he had threatened appellees with enforcement of the Act and deny-

ing that the Act was unconstitutional. At the same time, Mr. Clark's motion of June 6, 1949 for summary judgment was denied, the court ruling that there were genuine issues of fact as to both the threatened enforcement and applicability of the Act to appellees. Depositions were taken on both issues. A Stipulation of Facts, agreed to be representative of plaintiff's activities, was also filed with the court.

Two years later, on March 17, 1952, the district court handed down its opinion, refusing to pass on the applicability of the Act to appellees on the ground that the defense of inapplicability could be asserted "in a criminal prosecution, if a prosecution is instituted." Notwithstanding its refusal to hold that the Act applies to appellees, the court went on to consider and adjudicate the general constitutional contentions posed by appellees. It held that the language of Section 307, making the disclosure requirements applicable to any person "whose principal purpose" was "to influence, directly or indirectly, the passage or defeat of any legislation" is so vague and indefinite as to be in violation of the Fifth Amendment; that the prohibition in Section 310(b) is repugnant to the constitutional guaranty of freedom of speech and of petition; that Sections 303 through 307 of the Act are unconstitutional for the additional reason that the penalty attached to their violation by Section 310(b) contravenes the First Amend-

ment.[4] The opinion further stated that the appellees had, "in fact, been threatened" informally with criminal prosecution, and granted a permanent injunction against prosecution of appellees "for violations of any provision of Section 303 to 307, inclusive".

Before an order granting this injunctive relief was entered, defendant McGrath, on April 7, 1952, resigned from office. Refusing to hold that the action abated because of his resignation, the district court entered its judgment on May 2, 1952, to take effect as of March 17, 1952, permanently enjoining "the defendant from instituting any prosecution against" appellees.[5]

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[4] Although the holding of unconstitutionality is expressly declared to be limited to Section 303 through 307 and to Section 310(b) of the Act, it should be noted that Section 308, dealing with lobbyists who engage themselves for pay, contains language similar to that found fatally defective by the court below in Section 307. Moreover, the penalty provision, contained in Section 310(b), ruled by the court to be in violation of the First Amendment, also attaches to violations of Section 308, and, if the court's reasoning is sound, would equally invalidate Section 308. Therefore, the net effect of the holding of the district court, if allowed to stand, is to invalidate the entire Lobbying Act.

[5] The defendant had filed a memorandum with the district court suggesting that (1) the action had abated on the resignation of Mr. McGrath and should be dismissed as moot, and (2) the court should not enter an order of injunction against Mr. McGrath *nunc pro tunc*.

THE QUESTIONS ARE SUBSTANTIAL

The Lobbying Act advances an interest of vital importance to the proper functioning of representative government. Through its disclosure requirements as to "membership, source of contributions and expenditures of organized groups", the Act was designed to aid "Congress in evaluating their representations and weighing their worth" (S. Rep. No. 1400, 79th Cong., 2nd Sess., p. 5). The district court's decision, by invalidating the Act, denies to Congress this means of determining whether pressure groups have distorted and obscured public opinion in order to serve their special interests. The question whether the court erred in reaching the broad constitutional issues posed by Appellees and in holding the Act unconstitutional is thus one of obviously substantial importance. The importance of the decision below is underscored by the fact that the court's holding misinterprets constitutional requirements and, at the same time, ignores settled principles of constitutional adjudication.

1. In a number of recent cases, the Supreme Court has been called upon to decide whether a criminal statute was definite enough to satisfy the requirements of the due process clause. The test is whether a statute is sufficiently definite to give notice of the required conduct to one who would avoid its penalties. *Jordan* v. *De George*, 341 U.S. 223, 231-232; *Dennis* v. *United States*, 341 U.S. 494, 515 (opinion of Vinson, C. J.); *United States*

v. *Hood*, 343 U.S. 148, 151; *United States* v. *Spector*, decided April 7, 1952. But "no more than a reasonable degree of certainty can be demanded", since "few words possess the precision of mathematical symbols." Accordingly "most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340. The statute meets the constitutional test of "reasonable degree of certainty" even though "one who deliberately goes perilously close to an area of proscribed conduct [is required to] take the risk that he may cross the line." *id.* The boundaries of criminal statutes are rarely, if ever, marked with precise accuracy; and the presence of any difficult "border line" or "peripheral" cases does not invalidate a statute where there is a hard core of circumstances to which the statute applies and as to which the ordinary person would have no doubt as to its application. *Jordan* v. *De George, supra; United States* v. *Wurzbach*, 280 U.S. 396, 399; *Nash* v. *United States*, 229 U.S. 373.

Application of these criteria of definiteness to the statute here involved shows that it satisfies the constitutional requirements. The Act gives clear warning that it applies to any person who receives contributions or expends money for the purpose

of "influenc[ing], directly or indirectly, the passage or defeat of any [federal] legislation." We believe that the quoted clause, found too indefinite by the court below, gives clear warning to potential violators. In any event, appellees could not be heard to protest that, were it applied to them, the Act failed to put them on notice of its prohibitions. As shown by the Stipulation of Facts, N.A.M. utilizes every known lobbying and propaganda technique for the purpose of influencing federal legislation of interest to its members. Moreover, the constitutional requirement of definiteness is met by the language of the Act on its face: all that must be done to avoid the area of danger, even if there existed any doubt as to the Act's applicability, is to keep a few records and file a quarterly financial statement. In addition, the fact that the Act requires a *purpose* or *intent* to influence legislation, furnishes further rebuttal of the argument that the Act is too vague. *Boyce Motor Lines* v. *United States,* 342 U.S. 337, 342; *Dennis* v. *United States,* 341 U.S. 494, 515-516 (opinion of Vinson, C. J.); *Williams* v. *United States,* 341 U.S. 97, 101-102; *Screws* v. *United States,* 325 U.S. 91, 101-103.[6]

2. The district court also asserted that Section 310(b), which prohibits convicted violators of the

[6] The same considerations show that in the clause "principal purpose, the word "principal" does not make the Act too vague.

Act from lobbying for a three-year period, contravenes the First Amendment. The short answer to this assertion is that if an individual convicted of a felony may be forever deprived of his civil rights, and if conviction of some offenses may disqualify the offender from thereafter holding any office of honor, trust, or profit under the United States, then *a fortiori* lobbyists convicted of violating the Lobbyong Act may, constitutionally, for a three-year period, be prohibited from lobbying. In any event, Section 310(b)'s validity should not have been passed upon by the court, inasmuch as the question was entirely academic and premature: no one had yet been convicted of violating the Act and the validity of a penalty provision cannot be determined before the penalty is actually imposed. *United States* v. *Wurzbach*, 280 U.S. 396.

Even if the district court was correct in ruling Section 310(b) invalid, the express terms of the Act's separability clause provide that "the validity of the remainder of the Act . . . shall not be affected" by Section 310(b)'s invalidity. In ruling that Section 310(b)'s invalidity renders unconstitutional the other Sections of the Act, the court below completely ignored the clear requirements of the separability clause.

3. The district court decided the foregoing constitutional questions without first deciding whether the Act applied to appellees. This pro-

cedure violated the "traditional policy" of passing on the question of applicability of an Act before reaching any question as to its constitutional validity. *Alma Motor Co.* v. *Timken,* 329 U.S. 129, 142.

The only justification attempted by the court for departing from this settled policy of constitutional adjudication was that the question of applicability of the Act to appellees "is a defense that must be passed upon, in a criminal proceeding, if a prosecution is instituted." (Opinion, Appendix A). But it is apparent that if the question of applicability was left for determination in a criminal proceeding, the question of constitutionality should also have been left for determination in the same proceeding. Moreover, even though the court emphasized that the question of applicability of the Act to N.A.M. must be determined in a later criminal prosecution, it nevertheless, at the same time, granted an injunction permanently enjoining the institution of any such prosecution. Thus, the opinion not only decided the constitutional questions without first deciding the question of applicability but also prevents that latter question from ever being decided.

4. Although Attorney General McGrath resigned before judgment had been entered, the district court insisted, over the defendant's opposition, in subsequently entering *nunc pro tunc* an order of injunction against him, although he no

longer had any official connection with the Lobbying Act or with federal criminal prosecutions. It was plain error to enjoin Mr. McGrath after he had left office (*Ex parte La Prade*, 289 U.S. 444, 455-6; *Snyder* v. *Buck*, 340 U.S. 15), and the direction that the decree be entered *nunc pro tunc* did not serve to cure the error. *Cuebas* v. *Cubeas*, 223 U.S. 376, 390.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General

MAY 1952.

APPENDIX A

1. Opinion

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, and KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD MCGRATH, *Defendant.*

Before Wilbur K. Miller, Circuit Judge; Henry A. Schweinhaut and Alexander Holtzoff, District Judges.

Holtzoff, District Judge: This action is brought by the National Association of Manufacturers of the United States and one of its officers against the Attorney General of the United States, to enjoin him from instituting prosecutions against them for violations of the Federal Regulation of Lobbying Act (Act of August 2, 1946, secs. 302-311, 60 Stat. 839; 2 U.S.C.A. secs. 261-270). The basis of the action is two-fold: first, that the Act is un-

constitutional; and, second, that even if valid, it is not applicable to the plaintiffs.

The Act may be divided into two arts: First, all persons, except political committees, who directly or indirectly solicit, collect, or receive money to be used principally to aid, or whose principal purpose is to aid in the passage or defeat of any legislation by the Congress of the United States; or to influence, directly or indirectly, the passage or defeat of legislation by the Congress of the United States, are required to keep a detailed and exact account of contributions and expenditures with receipted bills, and to file with the Clerk of the House of Representatives quarterly statements listing contributions and expenditures (Secs. 303-307).

The second part of the Act requires persons who engage for pay, or for any consideration, to attempt to influence the passage or defeat of legislation by the Congress of the United States, to register with the Clerk of the House of Representatives and with the Secretary of the Senate, and to file certain quarterly reports (Sec. 308). These two parts of the Act are severable. The second is not involved in this action.

It is a general principle that equity will not enjoin prosecuting officers of the Government from instituting or maintaining criminal prosecutions.[1]

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[1] *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95. *Cave* v. *Rudolph*, 53 App. D. C. 12, 15.

Any defense that a person has to a criminal prosecution may be asserted at the trial of the criminal case and will not be adjudicated in advance by a court of equity. For this reason, this Court will not consider the contention that on the factual situation presented by the evidence, consisting of lengthy depositions and voluminous exhibits, the plaintiff Association is not subject to the terms of the statute. This is a defense that must be passed upon, in a criminal proceeding, if a prosecution is instituted.

On the other hand, an exception to the general principle is at times made if it is contended that the statute is unconstitutional and the consequences of a violation may be unusually serious, possibly resulting in irreparable damage.[2] For example, in this case if the statute is valid and the Association erroneously determines that it is not subject to its provisions, it may be liable to a penalty, not only of a fine, but of a proscription for a period of three years from attempting to influence directly or indirectly the passage or defeat of any proposed legislation by the Congress.

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[2] *Dobbins* v. *Los Angeles*, 195 U.S. 223, 241; *Ex parte Young*, 209 U.S. 123, 163 *et seq.*; *Truax* v. *Raich*, 239 U.S. 33, 37-39; *Adams* v. *Tanner*, 244 U.S. 590; *Terrace* v. *Thompson*, 263 U.S. 197, 214; *Packard* v. *Banton*, 264 U.S. 140, 143; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 451-2; *Parker* v. *Brown*, 317 U.S. 341, 349-350; *Hynes* v. *Grimes Parking Co.*, 337 U.S. 86, 98-100.

The Court is of the opinion that this case is within the exception insofar as concerns the contention that the pertinent provisions of the statute are unconstitutional. Accordingly the Court will in this action pass upon the validity of these provisions.

The Government has raised the question whether the plaintiffs are in a position to maintain this action on the ground that no prosecution has, as yet, been threatened. A great deal of testimony has been taken on this issue. The Court finds that such a prosecution has, in fact, been threatened, even though the threat has not been made formally.

The vital provisions of the pertinent portions of the statute (Sec. 307) makes its requirements applicable to any person who, by himself or through any agent or employee, or other persons, in any manner whatsoever, directly or indirectly, solicits, collects, or receives money to be used principally to aid, or whose principal purpose is to aid, in the passage or defeat of any legislation by the Congress, or to influence, directly, or indirectly, the passage or defeat of any legislation by the Congress of the United States. It is a well established principle that a criminal statute must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine whether any action, or failure to act, is prohibited. A criminal statute which does not comply with

this principle is repugnant to the due process clause and is, therefore, invalid. This is a fundamental principle in our constitutional system, since without it, it would be possible to punish a person for some action or failure to act not defined in the criminal law and which that person had no way of knowing was forbidden.

For example, in *International Harvester Co.* v. *Kentucky,* 234 U.S. 216, 221, the Court passed upon the validity of a Kentucky statute, which made certain combinations for the purpose of controlling prices lawful, unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. The Court held that the statute offered no standard of conduct and was, therefore, invalid.

In *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89, the Court held unconstitutional an Act of Congress, which made it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. This result was reached on the ground that no definite standard of conduct was prescribed by the statute.

In *Conally* v. *General Const. Co.,* 269 U.S. 385, 391, the Court considered an Oklahoma statute, which provided that all persons employed by or on behalf of the State shall be paid not less than the current rate of per diem wages in the locality where the work is performed. It was held that

this statute was repugnant to the due process clause of the Fourteenth Amendment on the ground that the phrase "current rate of wages" and the word "locality" were indefinite and ambiguous. The Court summarized the pertinent principles as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary motions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 456, the Court struck down a State statute, which declared all combinations to be against public policy, unlawful and void, except those whose object and purpose was to conduct operations at a reasonable profit or to market at a reasonable profit those products which otherwise could not be so marketed. The Court reached the conclusion that this statute involved so many factors of varying effect that one could not decide in advance

whether any proposed action on his part would violate it.

In *Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, 242, the Court held invalid a statute, which prohibited production of crude oil in such manner and under such conditions as to constitute waste. The Court referred to the fact that the general expressions employed were not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty.

In *Lanzetta* v. *New Jersey,* 306 U.S. 451, the Court had before it a New Jersey statute to the effect that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, is declared to be a gangster. The Court held that the words "gang" and "gangster", and the phrase, "known to be a member", were ambiguous and so vague, indefinite, and uncertain as to render the statute repugnant to the due process clause of the Fourteenth Amendment.

In *Winters* v. *New York,* 333 U.S. 507, a New York statute which punished anyone who published, sold, distributed, or showed, or had in his possession, with intent to sell, distribute or show, any printed paper principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of

bloodshed, lust, or crime, was deemed not to meet the required standards and not to contain ascertainable standards of guilt. The Court concluded that the statute was violative of the due process clause of the Fourteenth Amendment.

The Court of Appeals for the District of Columbia in *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, passed upon a statute imposing penalties on any street railway company in the District of Columbia, that failed to supply and operate a sufficient number of cars, to all persons desirous of the use of said cars, "without crowding said cars". The Court held that the statute was unconstitutional, as the phrase "without crowding" was to uncertain and indefinite to constitute an ascertainable standard of guilt. It pointed out that the dividing line between what is lawful and unlawful may not be left to conjecture.

Applying the foregoing doctrine to the instant case, the conclusion is inescapable that Sections 303 to 307 are invalid. The clause "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress" is manifestly too indefinite and vague to constitute an ascertainable standard of guilt. What is meant by influencing the passage or defeat of legislation indirectly? It may be communication with Committees or Members of the Congress; it may be to cause other persons to communicate with Committees or Members of the Congress; it may be to influence

public opinion by literature, speeches, advertisements, or other means in respect to matters that might eventually be affected by legislation; it may be to influence others to help formulate public opinion. It may cover any one of a multitude of undefined activities. No one can foretell how far the meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

The statement found in a prior clause of Section 307 to the effect that its provisions apply to certain persons whose principal purpose is to aid in the accomplishment of the enumerated objectives, is likewise subject to the same criticism.

What is meant by "principal purpose"? Is the term "principal" used as distinguished from "incidental"? May a person have a number of principal purposes? Or is the term used as meaning the "chief" purpose of a person's activities? When does a purpose become principal and when does it cease to be such? The Act contains no definition of that term.

We conclude that Sections 303 to 307, inclusive, are invalid as contravening the due process clause of the Fifth Amendment in failing to define the offense with sufficient precision and to set forth an ascertainable standard of guilt.

Section 310 of the Act, which relates to penalties, subjects any person who violates the provisions of the Act to a fine of not more than

$5,000, or imprisonment for not more than twelve months, or both. In addition, subsection (b) of Section 310, provides that any person so convicted shall be prohibited for a period of three years from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation, or from appearing before a Committee of the Congress in support of or opposition to proposed legislation. Violations of this prohibition are made felonies punishable by imprisonment for not more than five years or a fine of $10,000.

Freedom of speech and the right of the people peaceable to assembly and to petition the Government for redress of grievances are guaranteed by the First Amendment to the Constitution. Congress is prohibited from making any law abridging these rights. The penalty provision of the Act, however, manifestly deprives a person convicted of violating the statute, of his constitutional right of freedom of speech and his constitutional right to petition the legislative branch of the Government. This clause is obviously unconstitutional. A person convicted of a crime may not for that reason be stripped of his constitutional privileges. In principle this provision is no different than would be an enactment depriving a person of the right of counsel, or the right of trial by jury, for a period of three years after conviction. It is inconceivable that

anyone would argue in support of the validity of such a provision, and yet, in principle, the penalty clause in this statute is no different. We, therefore, reach the further conclusion that Sections 303 to 307 inclusive, of the statute are unconstitutional in that the penalty attached to their violation is invalid and contravenes the First Amendment to the Constitution.

Accordingly, we hold that Sections 303 to 307, inclusive, of the Act are unconstitutional. We regard Section 308 as severable and we, therefore, do not express any opinion as to its validity, because that question is not involved in this litigation.

A permanent injunction against the prosecution of the plaintiffs for violations of any provision of Sections 303 to 307, inclusive, is granted.

/s/ WILBUR K. MILLER
United States Circuit Judge.

/s/ HENRY A. SCHWEINHAUT
United States District Judge.

/s/ ALEXANDER HOLTZOFF
United States District Judge.

MARCH 17, 1952

2. Final Judgment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, and KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD MCGRATH, *Defendant.*

This action having come before the Court for final hearing on plaintiffs' request for a permanent injunction restraining defendant from instituting prosecutions against them for violation of the Federal Regulation of Lobbying Act (60 Stat. 839, 2 U.S.C. 261-270) and for declaratory relief; and the Court having considered the evidence, pleadings, briefs and the entire record in the case; and the Court having concluded that the defendant has threatened plaintiffs with criminal prosecutions if they fail to comply with the Act, that a present and justiciable controversy between plaintiffs and defendant exists, that plaintiffs are entitled to invoke the equity jurisdiction

of this Court to enjoin the threatened criminal prosecutions, and that Sections 303 through 307 and the penalty provision of Subsection (b) of Section 310 of the statute are unconstitutional; and the Court having rendered a written opinion and having made Findings of Fact and Conclusions of Law; it is by the Court

ORDERED, ADJUDGED AND DECREED that defendant is permanently enjoined from instituting any prosecution against plaintiffs, or either of them, for any violation, past or future, of any provision of Sections 303 to 307, inclusive, of the Federal Regulation of Lobbying Act (60 Stat. 839, 2 U.S.C. 261-270).

Dated May 2, 1952, to take effect as of March 17, 1952.

/s/ WILBUR K. MILLER
United States Circuit Judge.

/s/ HENRY A. SCHWEINHAUT
United States District Judge.

/s/ ALEXANDER HOLTZOFF
United States District Judge.

APPENDIX B

LEGISLATIVE REORGANIZATION ACT OF 1946

1. Title III—Regulation of Lobbying Act (60 Stat. 812, 839; 2 U.S.C. 261-270)

SHORT TITLE

SEC. 301. This title may be cited as the "Federal Regulation of Lobbying Act".

DEFINITIONS

SEC. 302. When used in this title—

(a) The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

(b) The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure.

(c) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons.

(d) The term "Clerk" means the Clerk of the House of Representatives of the United States.

(e) The term "legislation" means bills, resolutions, amendments, nominations, and other

matters pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House.

DETAILED ACCOUNTS OF CONTRIBUTIONS

SEC. 303. (a) It shall be the duty of every person who shall in any manner solicit or receive a contribution to any organization or fund for the purposes hereinafter designated to keep a detailed and exact account of—

(1) all contributions of any amount or of any value whatsoever;

(2) the name and address of every person making any such contribution of $500 or more and the date thereof;

(3) all expenditures made by or on behalf of such organization or fund; and

(4) the name and address of every person to whom any such expenditure is made and the date thereof.

(b) It shall be the duty of such persons to obtain and keep a receipted bill, stating the particulars, for every expenditure of such funds exceeding $10 in amount, and to preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

RECEIPTS FOR CONTRIBUTIONS

SEC. 304. Every individual who receives a contribution of $500 or more for any of the purposes hereinafter designated shall within five days after receipt thereof rendered to the person or organization for which such contribution was received a detailed account thereof, including the name and address of the person making such contribution and the date on which received.

STATEMENTS TO BE FILED WITH CLERK OF HOUSE

SEC. 305. (a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing—

(1) the name and address of each person who has made a contribution of $500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $500 or more to such person since the effective date of this title;

(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

(3) the total sum of all contributions made to or for such person during the calendar year;

(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

STATEMENT PRESERVED FOR TWO YEARS

SEC. 306. A statement required by this title to be filed with the Clerk—

(a) shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia, but in the event it is not received, a

duplicate of such statement shall be promptly filed upon notice by the Clerk of its nonreceipt;

(b) shall be preserved by the Clerk for a period of two years from the date of filing, shall constitute part of the public records of his office, and shall be open to public inspection.

PERSONS TO WHOM APPLICABLE

Sec. 307. The provisions of this title shall apply to any person (except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

REGISTRATION WITH SECRETARY OF THE SENATE AND CLERK OF THE HOUSE

Sec. 308. (a) Any person who shall engage himself for pay or for any consideration for the

purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation, nor to any public official acting in his official capacity; nor in the case of any news-

paper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.

Reports and Statements To Be Made Under Oath

Sec. 309. All reports and statements required under this title shall be made under oath, before an officer authorized by law to administer oaths.

PENALTIES

Sec. 310. (a) Any person who violates any of the provisions of this title, shall, upon conviction, be guilty of a misdemeanor, and shall be punished by a fine of not more than $5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

EXEMPTION

Sec. 311. The provisions of this title shall not apply to practices or activities regulated by the Federal Corrupt Practices Act nor be construed as repealing any portion of said Federal Corrupt Practices Act.

2. Separability Clause (60 Stat. 812, 814)

Sec. 1 (b) *Separability Clause.* If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 174

J. HOWARD McGRATH,

Appellant,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA and KENNETH R. MILLER,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss	1
Mr. McGrath is not entitled to appeal and the appeal should be dismissed as to him	2
The United States is not entitled to appeal and the appeal should be dismissed as to it	2
Mr. McGranery had the right to substitute himself for Mr. McGrath in the District Court and to take the appeal in his own name	4
This Court should enter an order as expeditiously as possible specifying the appellant	5
Appellees do not oppose the jurisdiction of the Supreme Court on the ground that the questions involved are not substantial	7

Table of Cases Cited

Bayard v. *Lombard*, 9 Howard 530	4
Cutting, Ex parte, 94 U.S. 14	4
Davis v. *Preston*, 280 U.S. 406	2
Fleming v. *Mohawk*, 331 U.S. 111	6
Industrial Commissioner of New York v. *Irving Trust Co.*, 286 U.S. 543	4
Payne v. *Niles*, 20 Howard 219	4
Snyder v. *Buck*, 340 U.S. 15	2, 6

Statutes and Authorities Cited

Federal Regulation of Lobbying Act	7
Federal Rules of Civil Procedure, Rule 25(d)	4, 6
Revised Rules of the Supreme Court, Rule 19, Paragraph 4	6
Statutes At Large:	
Volume 43, Page 936	6
Volume 50, Page 751	3
Volume 62, Page 992	6
United States Code Annotated, Title 28:	
Section 401	3
Section 2403	3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD McGRATH,

Defendant.

APPELLEES' COUNTER-STATEMENT WITH RESPECT TO JURISDICTION, AND MOTION TO DISMISS

The Solicitor General has sought to take this appeal on behalf of alternative appellants and without specifying a particular appellant. The appeal papers state that the appeal is taken by Mr. McGrath, or in the alternative by Mr. McGranery, or in the further alternative by the United States. The purpose of this counter-statement is to make clear appellees' position concerning this procedure, and to request the Court to rule specifically and expeditiously as to who is the proper appellant.

For reasons more fully developed below, appellees believe that neither Mr. McGrath nor the United States is entitled to appeal and therefore the appeal should be dismissed as to them. We believe that Mr. McGranery had the right to substitute himself for Mr. McGrath in the district court and thereafter to take the appeal in his own

name. This was not done, and the question arises whether the proper procedure has been followed in seeking to take an appeal before being made a party below. However, since he has moved to substitute himself in the Supreme Court, we do not press the point here. We do insist, however, that this Court should by order make it clear that Mr. McGranery is substituted unconditionally and is the sole appellant, and that this should be done as expeditiously as possible so that appellees will know who the real appellant is and accordingly know their rights and obligations in this matter.

Mr. McGrath Is Not Entitled to Appeal and the Appeal Should Be Dismissed as to Him

Mr. McGrath resigned on April 7, 1952. The petition for appeal was presented, and the order allowing appeal entered, on May 28, 1952. Since this is a suit for declaratory judgment and injunctive relief against enforcement of the Federal Regulation of Lobbying Act, and since after his resignation Mr. McGrath had no authority to enforce the Act, he was not at the time the appeal was taken in a position to invoke a review by this Court. All right and discretion to do so passed to his successor, Mr. McGranery. The Supreme Court has expressly so held in cases where the facts for all material purposes were identical to those here. *Davis* v. *Preston*, 280 U. S. 406; *Snyder* v. *Buck*, 340 U. S. 15, 20. Accordingly, we submit that the appeal should be dismissed as to Mr. McGrath.

The United States Is Not Entitled to Appeal and the Appeal Should Be Dismissed as to It

The Solicitor General requests that, if neither Mr. McGrath nor Mr. McGranery is deemed a proper appellant, the appeal be considered as taken by the United States.

The Solicitor General relies on 28 U.S.C. 2403, which provides in part that: "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality."

That statute, however, has no application here. By its language it applies only to actions where "the United States or any agency, officer or employee thereof is not a party." Here the Attorney General of the United States was a party.[1] Aside from this language, it is clear from the statute as a whole that it was not intended to apply to situations such as this. For example, it provides that in the circumstances described the Court shall certify to the Attorney General the fact that the constitutionality of an Act of Congress is involved. The obvious purpose is to put the United States on notice where a suit between private parties involves a constitutional question, so that the United States may intervene and defend the statute. There is no need for such notice to the Attorney General in a case such as this where the Attorney General is himself a party

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[1] If it be suggested that no officer was a party because the Attorney General was not sued in his official capacity, the answer is that the statute does not distinguish between actions against officers in their official capacity and actions against them individually. The suit here was grounded on acts performed by the Attorney General by virtue of his office; that is enough to take the matter out of the statute. This conclusion is confirmed by the fact that the statutory predecessor of this section made the intervention procedure applicable to any suit "to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party" (50 Stat. 751, 28 U.S.C. 401 (1940 ed.)). In the revision of Title 28 of the United States Code the words "as such officer or employee" were dropped.

and already has notice. Moreover, the statute was intended to authorize intervention in the court where the action is initiated, not to authorize appeal by the United States where it has made no effort to intervene below. We submit, therefore, that the statute does not apply here and consequently the appeal should be dismissed as to the United States.

Mr. McGranery Had the Right to Substitute Himself for Mr. McGrath in the District Court and to Take the Appeal in His Own Name.

Mr. McGranery was appointed to the office of Attorney General on April 3, 1952, his appointment was confirmed on May 20, 1952, and he took the oath of office on May 27, 1952. Under Rule 25(d) of the Federal Rules of Civil Procedure, he had the right to substitute himself for Mr. McGrath in the court below, and thereafter to take this appeal in his own name. It is the general rule that before one may invoke the appellate jurisdiction of the Supreme Court he must establish his status as a party to the record in the court below. *Bayard* v. *Lombard*, 9 Howard 530, 531; *Payne* v. *Niles*, 20 Howard 219, 221; *Ex parte Cutting*, 94 U.S. 14, 20-22; *Industrial Commissioner of New York* v. *Irving Trust Co.*, 286 U.S. 543. This would seem to indicate that Mr. McGranery should have moved to substitute himself in the district court before taking the appeal. Appellees do not insist upon this procedural point, however, because: (1) they recognize the interest of the United States in obtaining Supreme Court review and have no desire to block review by making any such technical objection; and (2) Mr. McGranery has moved to substitute himself in the Supreme Court, which motion appellees do not oppose.

Appellees do insist, however, that if the appeal is to be deemed as taken by Mr. McGranery and if he is substituted for Mr. McGrath by the Supreme Court, such substi-

tution should not be conditional as the Solicitor General appears to suggest. The Solicitor General says that he requests Mr. McGranery's substitution "solely in order to preserve the Government's right of appeal" and that "the request in no way concedes or implies that Mr. McGranery has threatened or is threatening to institute criminal prosecutions against either or both appellees for violations of the Act, or that the allegations or findings in the district court relating to Mr. McGrath or Mr. Clark are applicable to Mr. McGranery" (Statement as to Jurisdiction, p. 1, fn. 1). This statement at least suggests that, in the Solicitor General's view, appellees might be required to show that Mr. McGranery has so threatened. If that is the intended implication, it is incorrect. Under Rule 25(d), Mr. McGranery may be substituted either on his own motion or on that of appellees. Here he has made the motion. His grounds are that substitution is necessary to permit him to appeal and seek reversal of a judgment which would otherwise stand in the way of his enforcement of the statute. Under such circumstances it is not necessary that appellees also show that he is threatening to enforce the statute. Certainly appellees are not required to make any showing in support of Mr. McGranery's motion, and if his motion is granted there is no requirement that appellees also move for his substitution. Consequently, if this Court grants Mr. McGranery's motion for substitution it should not be conditioned in any way.

This Court Should Enter an Order as Expeditiously as Possible Specifying the Appellant

Appellees are entitled to know as soon as possible who the actual appellant is. Otherwise they may be subjected to uncertainty and vexation for which they are not responsible and which they cannot remedy.

Under *Snyder* v. *Buck*, 340 U.S. 15, so long as the case is still "pending" appellees run the risk that, if a motion to substitute Mr. McGranery is not made within 6 months from the time he took office (or by November 27, 1952), the action may be dismissed and they may be forced to start over below.[2] If the Supreme Court substitutes Mr. McGranery on the Solicitor General's motion prior to November 27, 1952, appellees need no longer be concerned with this problem. If the Supreme Court should conclude, however, that Mr. McGrath is the proper appellant, then appellees might be required to move to substitute Mr. McGranery before that date. If the Court should wait until after November 27, 1952, and then rule that no one has properly appealed and the appeal should be dismissed in its entirety, it might be necessary that appellees have on file in the Supreme Court or in the district court, or in both, a timely motion to substitute Mr. McGranery. Consequently, unless the Supreme Court rules on this question in advance of November 27, 1952, appellees will be in a dilemma as to whether any action is required of them, and, if so, where.

Appellees are in no way responsible for this situation. It arises because Mr. McGranery did not move to substitute himself in the district court before seeking to appeal, and has moved in the Supreme Court to substitute and appeal only if Mr. McGrath is an improper appellant. Appellees are entitled to know who the appellant is and con-

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[2] Paragraph 4 of Rule 19 of the Revised Rules of the Supreme Court provides that the matter of substitution in cases of this kind is covered by section 11 of the Act of February 13, 1925 (43 Stat. 936, 941). That statute authorized substitution within 6 months after the predecessor's separation from office, which in this case would be October 7, 1952. That Act, however, was specifically repealed as of September 1, 1948 (62 Stat. 992, 1000). We take it, therefore, that the Solicitor General's motion is based on the assumption that Rule 25(d) of the Federal Rules of Civil Procedure now applies to substitution in the Supreme Court as well as in the district courts. See *Fleming* v. *Mohawk*, 331 U.S. 111; *Snyder* v. *Buck*, 340 U.S. 15, 17, fn. 2.

sequently what is required of them to protect their judgment below. For these reasons we respectfully submit that the Supreme Court should enter an order specifying the appellant and, if it is Mr. McGranery as we think it should be, substituting him unconditionally on the motion of the Solicitor General. We further submit that such an order should be entered as soon as possible, and in any event well in advance of November 27, 1952.

Appellees Do Not Oppose the Jurisdiction of the Supreme Court on the Ground that the Questions Involved Are Not Substantial.

Appellees do not, of course, agree that the district court erred in any of the respects assigned by the Solicitor General. Nor do we agree with the arguments made by him in his Statement as to Jurisdiction. We believe that the statute involved is clearly unconstitutional, as held by the district court, and that the judgment below should be affirmed. However, since this is the first case involving the constitutionality of the Federal Regulation of Lobbying Act to reach the Supreme Court, we are not contending here that the questions involved are so unsubstantial as to preclude review by the Supreme Court.

Respectfully submitted,

CARL MCFARLAND, (K.L.K.)
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Attorneys for Appellees.

JUNE 13, 1952.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

J. HOWARD MCGRATH, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL; AND

MOTION TO VACATE THE JUDGMENT OF THE DISTRICT COURT AS MOOT

Appellees concede that the questions on appeal are substantial, but suggest that the appeal should be dismissed both as to Mr. McGrath, the former Attorney General, and as to the United States. Appellees do not object to the substitution of Attorney General McGranery, as appellant, which the Solici-

tor General has requested if necessary in order to preserve the Government's right of appeal, but they "insist, however, that this Court should by order make it clear that Mr. McGranery is substituted unconditionally and is the sole appellant, and that this should be done as expeditiously as possible so that appellees will know who the real appellant is and accordingly know their rights and obligations in this matter." (Appellees' Counter-Statement, pp. 1-2.) For the reasons stated below, we believe that appellees' motion to dismiss should be denied, and that the judgment of the district court should be vacated as patently and concededly moot. In the event, however, that probable jurisdiction should be noted, it is submitted that further consideration of any questions that may be raised as to the proper party or parties appellant should be deferred to the hearing on the merits.

1. The judgment sought to be appealed from in this case was entered against Mr. McGrath on May 2, 1952, twenty-five days after he had resigned as Attorney General on April 7, 1952. Appellees recognize the obvious fact that "after his resignation Mr. McGrath had no authority to enforce the [Lobbying] Act." (Counter-Statement, p. 2.) On the basis of this undisputed premise, appellees argue that Mr. McGrath's resignation deprived him of standing to object to the judgment or to seek review of it. They contend that, because the matter had been made entirely academic as to him as a result of his resig-

nation, Mr. McGrath could not be heard to complain of the judgment against him either upon or after entry. A major ground of this appeal, however, is that the judgment below was moot when it was entered, and that the district court lacked power, once the "case" or "controversy" was terminated by Mr. McGrath's resignation on April 7, 1952, to enter a judgment against him effective *nunc pro tunc* as of March 17, 1952. Appellees thus are in the curious position of relying upon one of the very errors upon which the appeal is based, namely, that the judgment was improperly entered against Mr. McGrath after the case was moot, as a reason for preventing that error from being reviewed and corrected. Appellees' contention seems to be that when a judgment holding a federal statute unconstitutional is improperly entered against a former Attorney General after the action has abated as to him, neither he nor his successor can, under any circumstances, obtain correction of that error by any court.

2. Having succeeded in obtaining such an order against Mr. McGrath, which they say he has no standing to appeal because it was moot against him the very moment it was entered, appellees are scarcely in a position to impose harsh conditions on his successor's appeal. Cf. *Stearns Co.* v. *United States*, 291 U.S. 54, 61-62. Yet they would require that Attorney General McGranery, as a condition precedent to obtaining review of the judgment erroneously entered against his predecessor, should "admit," without regard to whether it is in fact

true, that he has threatened or is threatening to institute criminal prosecutions against appellees for violations of the Lobbying Act. Appellees would offer Attorney General McGranery the unhappy choice either of foregoing the Government's right of appeal in this case or of waiving, as a price of maintaining the appeal, defenses and objections he might make if a new suit were now to be brought against him for the same relief sought against Mr. McGrath. We submit, however, that the Government is entitled to proceed in this appeal in the name of Mr. McGrath, or, if necessary, his successor, or in its own name.

3. In view of the undisputed facts, it is clear that the action against Mr. McGrath has abated and that the judgment of the district court should be vacated as moot. *United States* v. *Munsingwear*, 340 U.S. 36, 39-41.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1952.

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NO. 174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

J. HOWARD MCGRATH, ET AL., *Appellants*,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees*.

Appeal from the United States District Court for the District of Columbia

---

BRIEF IN OPPOSITION TO APPELLANTS' MOTION TO VACATE THE JUDGMENT OF THE DISTRICT COURT AS MOOT; AND

REPLY BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS THE APPEAL

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

PYSER OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 174.

J. HOWARD MCGRATH, ET AL., *Appellants*,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees*.

Appeal from the United States District Court for the District of Columbia

---

BRIEF IN OPPOSITION TO APPELLANTS' MOTION TO VACATE THE JUDGMENT OF THE DISTRICT COURT AS MOOT; AND

REPLY BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS THE APPEAL

I.

Appellants' motion to vacate the judgment of the district court as moot should be denied for the following reasons:

1. Appellants do not state any ground whatsoever in support of their motion. They say only that "it is clear

that the action against Mr. McGrath has abated and that the judgment of the district court should be vacated as moot" (Appellants' brief, p. 4). In the absence of any argument by appellants in support of their motion, appellees should not be required to answer and the motion should be summarily denied.

2. It is not clear from the statement quoted above from appellants' brief whether they mean to suggest that the action has abated in its entirety and that the judgment should be vacated and the complaint dismissed, or whether they mean to suggest only that the action has abated as to Mr. McGrath and that the judgment should be vacated as to him and the complaint left standing for the substitution of Attorney General McGranery. In either event, appellants manifestly are in error. The rule permitting substitution within six months is specifically designed to avoid any such result. It makes "survival of the action dependent on a timely substitution." *Snyder* v. *Buck*, 340 U.S. 15, 19. When there is such timely substitution, the action does not abate but survives. The action abates only when the six-month period expires without substitution. In this case the six-month period has not expired. Appellants have already moved to substitute Attorney General McGranery. If that motion does not dispose of the problem, appellees will take whatever steps are necessary to keep the action alive (see Statement Opposing Jurisdiction, p. 6). Consequently the action has not abated and will not abate. It would thus be wholly inconsistent with the rule and nullify its purpose to vacate the judgment below as suggested by appellants.

3. The case of *United States* v. *Munsingwear*, 340 U. S. 36, 39-41, cited by appellants, does not support their contention. It points out that the procedure of vacating the judgment below and directing dismissal of the complaint is one utilized by the Court "to prevent a judgment, unreviewable because of mootness, from spawning any legal

consequences." But the judgment here is not unreviewable because of mootness. It may be reviewed upon the proper substitution of Attorney General McGranery.

4. It may be that appellants mean to imply that the judgment should be vacated on the ground that the district court should not have entered the judgment *nunc pro tunc*. That, however, is assigned by appellants as one of the errors to be heard on the appeal. In any event it is not a proper ground for their motion to vacate the judgment as moot.

II.

Appellants' contentions in opposition to our motion to dismiss as to Mr. McGrath and the United States are without merit for the following reasons:

1. Appellants' first argument seems to be that Mr. McGrath should be permitted to invoke a review by this Court because of the fact that one of the errors assigned is that the case was moot when the judgment was entered and the district court was mistaken in entering the judgment *nunc pro tunc* (Appellants' brief, pp. 2-3). There are a number of answers. First, the case manifestly was not and is not moot for the reasons stated above. Second, the reason why Mr. McGrath has no right to take this appeal is that he no longer is responsible for enforcement of the Act, all right to do so and with it the right to take this appeal having passed to his successor Mr. McGranery. The fact that one of the errors assigned relates to the entry of the judgment *nunc pro tunc* makes no difference. That is just one of a number of errors which appellants say were made in the entry of the judgment. Moreover, Mr. McGrath has not appealed, and we think cannot appeal, to seek review of that question alone. It is equally clear that the assignment of that error does not give him the right to invoke review as to the other alleged errors. In order to obtain review of the errors assigned by

appellants it is thus necessary to substitute Attorney General McGranery. Once he is substituted Mr. McGrath no longer has any possible interest in the judgment or any other aspect of the case. Third, appellants conclude that our position is that neither Mr. McGrath nor Attorney General McGranery can under any circumstances seek review of the alleged error with respect to the *nunc pro tunc* entry of the judgment. That is not our position. We say that Mr. McGrath cannot invoke review of this or the other questions. We have further said, however, that we do not oppose Mr. McGranery's motion to substitute himself and to seek review of the judgment below.

2. In their second point, appellants seem to argue that Attorney General McGranery should be able to substitute himself and take the appeal without admitting "that he has threatened or is threatening to institute criminal prosecutions against appellees for violations of the Lobbying Act", and that even if Mr. McGranery is substituted on his own motion appellees should still be required to show such a threat (Appellants' brief, pp. 3-4). Such a position is manifestly incorrect. The rule on substitution provides that "the action may be continued and maintained by or against" the successor upon a satisfactory showing "that there is a substantial need for so continuing and maintaining it." Under the rule, either party may move for substitution. Here Attorney General McGranery has moved on the ground that there is a substantial need for continuing the action so that he may obtain review by this Court. We do not oppose that motion. But we do say that, if his motion is granted, we certainly are not required to make a separate motion to substitute him and consequently are under no obligation to make any showing such as appellants suggest.

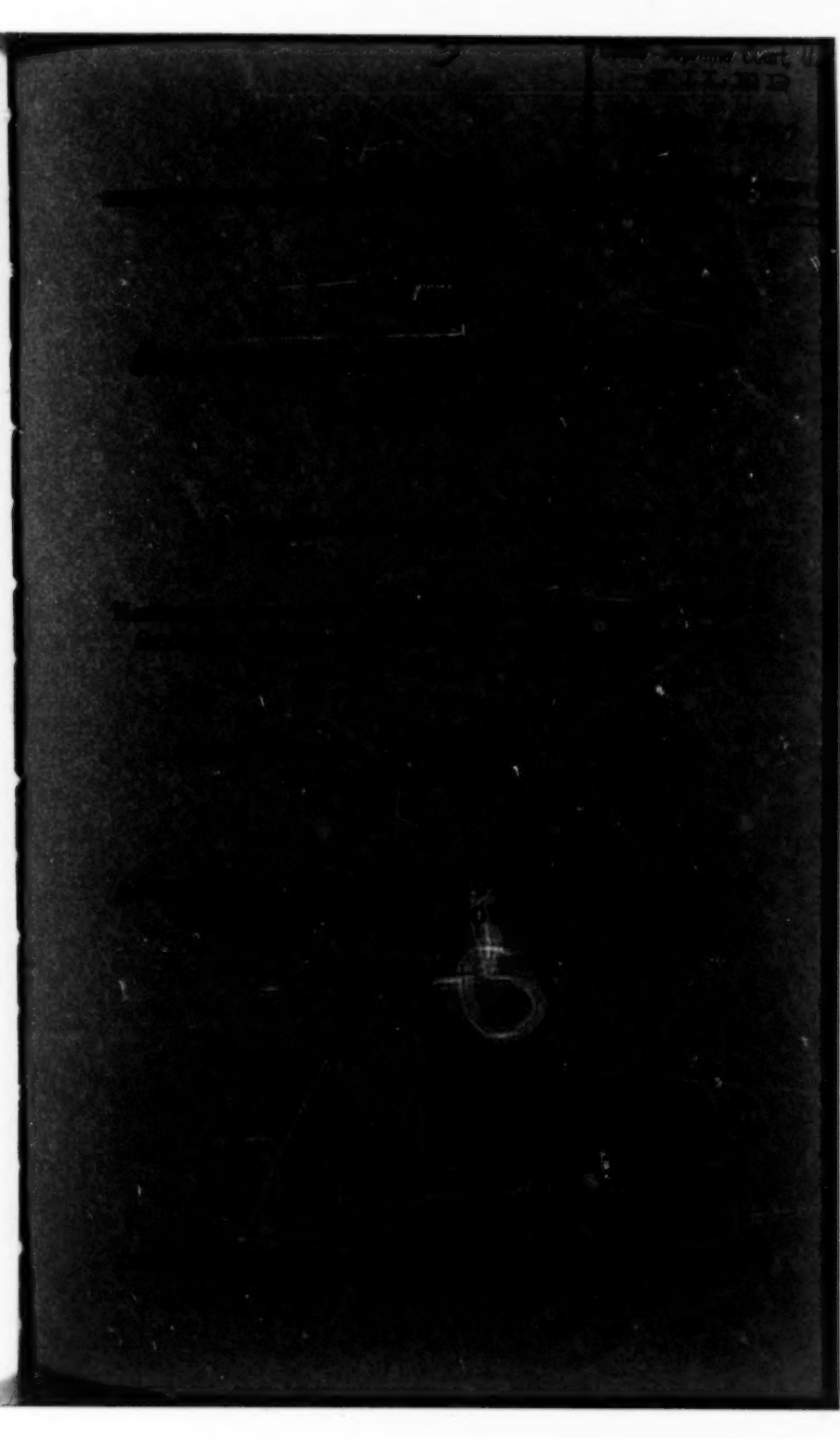
3. Appellants also suggest that consideration of our motion to dismiss as to Mr. McGrath and the United States should be deferred to the hearing on the merits (Appel-

lants' brief, p. 2). We believe, however, that appellants' arguments here—their insistence that Mr. McGrath is entitled to invoke review of the judgment below, and their further insistence that even after Attorney General McGranery is substituted on his own motion we should be required to show continued enforcement of the Act by him—demonstrate more clearly than ever the necessity for early action on Attorney General McGranery's motion for substitution and our motion to dismiss. We have no intention of permitting the action to abate through expiration of the six-month period for substitution. We desire to preserve the judgment below, and we intend to take whatever steps are necessary to that end. Until this Court enters an order on Mr. McGranery's substitution motion and our motion to dismiss, however, we shall not know what, if anything, is required of us. Appellants alone are responsible for that uncertainty because of the manner in which they have sought to proceed. Consequently, we submit that this Court should enter an order on these two motions as soon as possible and, in any event, well in advance of November 27, 1952, the expiration date of the six-month period for substitution under Rule 25(d).

Respectfully submitted,

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

July, 1952.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 174

J. HOWARD MCGRATH, ET AL., *Appellants,*

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees.*

Appeal from the United States District Court for the District of Columbia

---

APPELLEES' MOTION TO SUBSTITUTE JAMES P. McGRANERY FOR J. HOWARD McGRATH

J. Howard McGrath resigned as Attorney General of the United States on April 7, 1952. James P. McGranery succeeded him in that office on May 27, 1952.

This Court's Rule 19(4) provides that in a case of this kind the matter of substitution is covered by Section 11 of the Act of February 13, 1925, which authorized substitu-

tion upon a motion filed within six months after the predecessor's separation from office. That statute, however, was repealed as of September 1, 1948 (62 Stat. 992, 1000). Despite that fact, the Rule has not yet been specifically changed and, if it still has effect, the time for filing a motion for substitution in this case expires on October 7, 1952.

Rule 25(d) of the Federal Rules of Civil Procedure permits substitution upon a motion filed within six months after the successor takes office. Under that Rule the time for filing an appropriate motion in this case does not expire until November 27, 1952.

The Solicitor General has sought to take the appeal in this case on behalf of Mr. McGrath or, in the alternative, Mr. McGranery. The Solicitor General has maintained that Mr. McGrath has standing to appeal despite his resignation. We have opposed that assertion and have moved to dismiss the appeal as to Mr. McGrath. The Solicitor General has further requested and moved that, if he is wrong in his contention with respect to Mr. McGrath, the appeal be deemed taken on behalf of Mr. McGranery and that he be substituted as appellant. We have not opposed that motion but have requested the Court to enter an order specifying the appellant and, if it is Mr. McGranery as we think it should be, substituting him unconditionally on the motion of the Solicitor General.

The Supreme Court has not yet ruled on these motions, and we do not expect it will do so until October 13, 1952. That will be six days after expiration of the time for filing a motion for substitution under Rule 19(4), if that Rule has any effect. As pointed out earlier (Statement Opposing Jurisdiction and Motion to Dismiss, p. 6), if Mr. McGranery is not substituted on the Solicitor General's motion, it is possible that appellees may be required to have on file a timely motion to substitute Mr. McGranery in order to avoid abatement and protect their judgment below.

Consequently, out of an abundance of caution, appellees file this motion to substitute, but with the express reser-

vation that it is filed subject to the two conditions stated below.

First, appellees respectfully request that this motion be considered only if the Court deems its Rule 19(4) to be effective. Appellees believe that, since the statute referred to in the Rule has been expressly repealed, the Rule itself has become ineffective, and Federal Rule 25(d) now governs substitution in this Court. There is indication in the decided cases that this Court concurs in that view. See *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119; *Snyder* v. *Buck*, 340 U. S. 15, 17, fn. 2. But the question has never been directly raised or decided in this Court. Solely as a protective measure, therefore, appellees file this motion to be considered only in the event that Rule 19(4) applies. If Rule 25(d) governs, it is likely that before the time for filing a motion expires the Court will have decided the Solicitor General's motion in such a fashion as to make unnecessary a motion by appellees, or in any event to make it clear what if anything is required of appellees. For that reason, if Rule 25(d) controls, appellees desire that this motion be disregarded. We shall file another motion under that Rule if the Court fails to act on the Solicitor General's motion by November 27, 1952, or acts in such a way as to indicate that a motion by us is necessary.

Second, appellees respectfully request that this motion be considered only in the event that Mr. McGranery is not substituted for Mr. McGrath on the Solicitor General's motion. That motion was filed some time ago when the appeal was taken. As we have stated previously, we believe that the proper substitution of Mr. McGranery on the Solicitor General's motion is necessary to enable the Government to invoke review (see Statement Opposing Jurisdiction and Motion to Dismiss; Brief in Opposition to Appellants' Motion to Vacate the Judgment and Reply Brief in Support of Appellees' Motion to Dismiss the Appeal). If that is the case, it is the obligation of the Solicitor General to secure substitution. Consequently his motion

should be considered first and entirely separately from this motion. If Mr. McGranery is so substituted on the Solicitor General's motion, as we believe he should be, there is no need for the filing or consideration of this motion. Appellees have no obligation to secure substitution except to eliminate all possibility of abatement in the event Mr. McGranery is for some reason not substituted on the Solicitor General's motion. Hence this motion is filed on that condition.

Subject to the two conditions stated above, appellees respectfully move that Mr. McGranery be substituted for Mr. McGrath. This motion is based on the ground that there is a substantial need for continuing and maintaining the cause and obtaining an adjudication of the questions involved, in that Mr. McGranery adopts and continues and threatens to adopt and continue the action of his predecessor in enforcing the Federal Regulation of Lobbying Act.

Respectfully submitted,

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

October 1952.

INDEX.

Page

Motion to Substitute 1

Brief in Support of Motion to Substitute 7

CITATIONS.

Cases.

Adams v. Tanner, 244 U. S. 590 13

Allen v. Regents, 304 U. S. 439 ..... 10, 11

Black v. Little, 8 F. Supp. 867 (E.D. Mich., 1934) 13

Carter v. Carter Coal Co., 298 U. S. 238 13

Chester C. Fosgate Co. v. Kirkland, 19 F. Supp. 152 (S.D. Fla., 1937) 14

Currin v. Wallace, 306 U. S. 1 12

Currin v. Wallace, 19 F. Supp. 211 (E.D. N.C.) 12

Euclid v. Ambler Co., 272 U. S. 365 12–13

Ex parte La Prade, 289 U. S. 444 ..... 9–10, 11

Gully v. Interstate Natural Gas Co., 82 F. 2d 145 (C.C.A. 5), cert. den. 298 U. S. 688 13

Pierce v. Society of Sisters, 268 U. S. 510 13

Sunshine Mining Co. v. Carver, 41 F. Supp. 60 (D. Idaho, 1941) 14

United States v. Robert M. Harriss, et al., Criminal No. 1212-49 ..... 2, 3, 4, 6, 7

United States v. Roger C. Slaughter, Criminal No. 1433-48 5

Wallace v. Currin, 95 F. 2d 856 (C.C.A. 4) 12

Statutes.

Section 11 of Judiciary Act of 1925 (43 Stat. 936) 11

Miscellaneous.

Borchard, *Declaratory Judgments* (2d ed.), pp. 43, 62, 276, 966 14

Fed. Rules of Civ. Procedure and Proceedings of the A.B.A. Institute, Cleveland (1938), p. 267 9

IN THE

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OCTOBER TERM, 1952.

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Appeal from the United States District Court for the District of Columbia

---

MOTION TO SUBSTITUTE JAMES P. McGRANERY FOR J. HOWARD McGRATH AND SUPPORTING BRIEF

MOTION TO SUBSTITUTE

On April 7, 1952, J. Howard McGrath resigned as Attorney General of the United States, and on May 27, 1952, James P. McGranery succeeded him. On October 2, 1952,

appellees filed in this Court a motion to substitute Mr. McGranery for Mr. McGrath, requesting that such motion be considered only if the Court deemed its Rule 19(4) to be effective and if Mr. McGranery was not substituted on the Solicitor General's motion. In that motion appellees stated they would, if necessary and at the appropriate time, file another motion to substitute under Rule 25(d) of the Federal Rules of Civil Procedure. Rule 25(d) provides that such a motion may be filed within six months after the successor takes office, which in this case would be November 27, 1952.

Appellees hereby move, pursuant to Rule 25(d), that Mr. McGranery be substituted for Mr. McGrath, and in support thereof allege as follows:

1. Mr. McGranery adopts and continues and threatens to adopt and continue the action of his predecessors in enforcing the Federal Regulation of Lobbying Act.

2. Since taking office on May 27, 1952, Mr. McGranery has done the following things, among others, which show that he considers the Act to be constitutional and adopts and continues the action of his predecessors in enforcing it:

(a) On August 31, 1949, when Mr. McGrath was Attorney General, the United States filed in the United States District Court for the District of Columbia a criminal information in *United States* v. *Robert M. Harriss, et al*, Criminal No. 1212-49, charging four individuals and a corporation with various violations of Sections 305 and 308 of the Act. That information has remained on file to date and therefore has been adopted by Mr. McGranery since he became Attorney General. A certified copy of the information appears in the transcript of record in this case and may be judicially noticed by the Court.

(b) On January 27, 1950, when Mr. McGrath was Attorney General, the United States filed in the district court in the said *Harriss* case a Memorandum of Law in Opposition to the Motions of the Defendants to Dismiss the Informa-

tion, which memorandum asserts that the Act is constitutional in all respects. That memorandum has remained on file to date and therefore has been adopted by Mr. McGranery since he became Attorney General. A certified copy of the memorandum appears in the transcript of record in this case and may be judicially noticed by the Court.

3. Since taking office on May 27, 1952, Mr. McGranery has done the following things, among others, which show that like his predecessors he construes Section 305 of the Act to apply to "every person receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of federal legislation, without any regard whatsoever to the requirements of Section 307 confining the applicability of the entire statute to a person who "receives money . . . to be used principally to aid, or the principal purpose of which person is to aid" in influencing the passage or defeat of federal legislation, and that therefore he like his predecessors construes the Act as applicable to appellees:

(a) The criminal information in the *Harriss* case (referred to in ¶2(a) above) alleges among other things in ¶8 thereof:

> That from and after August 2, 1946, under the provisions of the Federal Regulation of Lobbying Act it has been the duty of every person receiving any contributions or expending any money, for the purpose of influencing directly or indirectly the passage or defeat of any legislation by the Congress of the United States, to file with the Clerk of the House of Representatives between the first and tenth day of each calendar quarter a statement under oath . . . as prescribed in Section 305 of the said Federal Regulation of Lobbying Act . . .

Mr. McGranery has adopted this criminal information as his own and therefore it reflects his interpretation of the Act. Since it was filed when Mr. McGrath was Attorney

General and has now been adopted by Mr. McGranery, it shows that Mr. McGranery adopts the same interpretation as Mr. McGrath.

(b) The memorandum of law filed in the *Harriss* case (referred to in ¶2(b) above) states among other things at pp. 41-44 thereof:

> It is seriously contended especially by the defendant Harriss that Section 307 was intended by Congress to restrict and limit the application of the entire Lobbying Act . . . It is submitted that Section 307 cannot be so interpreted . . .
>
> A careful analysis of the language of Section 307 clearly indicates that it is not a language of restriction . . . If Congress had intended to make Section 307 the limitation provision of the statute, express words of restriction could have been used . . .
>
> For example, if Section 307 limits the application of the entire lobbying act only to those who solicit, collect, or receive money, etc., what about Section 305 where persons *expending* money are also required to file reports? Also what about Section 305(a) (4, 5, 6) which provides for reporting of expenditures? Must those provisions also be nullified? . . .
>
> * * *
>
> What then was the purpose of Section 307? What construction can be given to it which can possibly be reconciled with the other provisions of the statute? It is submitted that Section 307 simply makes explicit as to a specified category of persons to which the act may be applicable and which category can only be implied from paragraphs 1 and 2 and 3 of Section 305(a), which on their face may apply impliedly to many categories. For example, paragraphs 1, 2 and 3 of Section 305 require all categories of persons to report contributions made to or for such persons during the calendar year, etc. Although these paragraphs do not specifically mention contributions received directly or through an agent or employee, such coverage can clearly be implied from the use of the terms "to or for". (See Sections 305, Subsection (a), paragraphs 2 and 3). What Section

307 does then is to make it clear that one of the categories unquestionably implied in those provisions of Section 305, namely those who through any agent or employee directly and indirectly solicits, collects or receives money to be used principally for lobbying purposes, is expressly included.

* * *

Indeed, the legislative history indicates that Section 308 for example was meant to be a separate and distinct provision. Section 308 in substance was the Black Bill of 1936, and was enacted to accomplish the intent of Congress with respect to a disclosure of the identity of professional lobbyists and the source of their income. Similarly, Section 305 is the Smith Bill of 1936, and was enacted to accomplish the intent of Congress with respect to the disclosure of pressure groups and their sources of income. As already indicated supra, Congress had two paramount purposes in enacting the Lobbying Act:

(1) The disclosure of pressure groups and their sources of income. These are provided for in the reporting Sections 303, 304 and 305 of the lobbying act.

(2) The identity of professional lobbyists and sources of their income. This is Section 308 of the same Act.

That memorandum has been adopted by Mr. McGranery as his own since he became Attorney General and therefore reflects his interpretation of the statute. Since the memorandum was filed when Mr. McGrath was Attorney General and has now been adopted by Mr. McGranery, it shows that Mr. McGranery adopts the same interpretation of the Act as Mr. McGrath.

(c) This construction thus adopted by Mr. McGranery is also the same as that contended for in the Memorandum in Opposition to the Motion of Defendant to Dismiss the Indictment (pp. 44-47) filed by the United States on March 18, 1949, in *United States* v. *Roger C. Slaughter*, Criminal No. 1433-48 (now closed), in the United States District

Court for the District of Columbia. That memorandum was filed when predecessor Tom C. Clark was Attorney General and was later adopted by predecessor McGrath. A certified copy of the memorandum is contained in the transcript of record in this case and may be judicially noticed by the Court. This shows that Mr. McGranery has adopted the same construction of the statute as his predecessors.

(d) The construction of the statute adopted by Mr. McGranery in the *Harriss* information and memorandum is also the same as that asserted in Defendant's Memorandum in Support of Motion for Summary Judgment (pp. 12-14) filed in the instant case on June 6, 1949, when predecessor Tom C. Clark was Attorney General, and the same as that asserted in Defendant's Trial Brief (pp. 76-81) filed in the instant case on November 9, 1951, when predecessor J. Howard McGrath was Attorney General. Copies of the above-mentioned memorandum and brief in the instant case are included in the transcript of record herein and may be judicially noticed. This shows that Mr. McGranery has adopted the same construction of the Act as his predecessors.

(e) The criminal information and memorandum in the *Harriss* case, which have been adopted by Mr. McGranery, show that he construes the statute as applicable to "every person receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of federal legislation. The complaint in the instant action (which appears in the transcript of record herein) alleges that one of the more general objectives of appellees is "the support of legislation in furtherance of [the principles of individual liberty and ownership of property] and opposition to legislation in derogation thereof", and that appellees carry out this objective as well as their many other objectives by methods which involve the expenditure of money (Pars. 1(a)(2), 1(d)(2)). Consequently the con-

struction of the Act adopted by Mr. McGranery renders it applicable to appellees on the basis of the allegations in their complaint herein.

4. Hearing on the motions to dismiss in the *Harriss* case, which among other things assert unconstitutionality of the statute, has been postponed in the United States District Court for the District of Columbia, with the consent of the United States, from the time Mr. McGranery took office to date, on the ground that the ruling of the Supreme Court in the instant suit may be controlling in that case. This action on the part of Mr. McGranery shows that he adopts the same views as his predecessors with respect to the construction and constitutionality of the Act and continues the action of his predecessors in enforcing the Act.

5. Mr. McGranery has moved that he be substituted and be allowed to appeal in the instant case if such is necessary. The assignments of error made herein reflect the same position which his predecessors have taken throughout this case. Such action shows that he intends to continue enforcement of the statute, and adopts the views of his predecessors with respect to the constitutionality, interpretation, and applicability of the Act.

6. Mr. McGranery considers the Act to be constitutional and adopts the same construction of it as his predecessors.

7. Mr. McGranery considers the Act valid and applicable to appellees, and will continue in the course of his predecessors in enforcing the Act against appellees unless he is enjoined from doing so.

BRIEF IN SUPPORT OF MOTION TO SUBSTITUTE

All of the facts alleged in the above motion are subject to judicial notice and incontrovertible, with the exception of certain of the allegations in paragraphs 4 and 7. We have not filed supporting proof for those allegations because we do not know whether they will be denied. If they are,

and if the Court deems further proof necessary, we request the opportunity to submit such proof.

The facts alleged—even those which are subject to judicial notice and indisputable—are clearly sufficient to warrant substitution under Rule 25(d). The district court found that predecessor Tom C. Clark threatened plaintiffs with criminal prosecutions if they failed to comply with the statute (Findings of Fact, Paragraph 7). The district court also found that predecessor J. Howard McGrath had adopted and continued this enforcement policy and therefore should be substituted pursuant to Rule 25(d) (Findings of Fact, Paragraph 9). The allegations above demonstrate that Mr. McGranery has adopted the same views as his predecessors with respect to the interpretation, applicability and constitutionality of the statute and is continuing to enforce the statute. Those allegations bring the matter directly within the requirements of Rule 25(d), and in fact more than satisfy that Rule.

Rule 25(d) provides that:

> Substitution pursuant to this Rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States.

It is clear that the Rule does not require the same showing as may be necessary in instituting the suit against the original defendant. Where a threat of enforcement by the original defendant has once been shown, as it has been here, it is necessary only to show that the successor continues "the action of his predecessor in enforcing [the] law." It is not necessary to show that the successor formally and expressly repeated the threat to the plaintiffs. Such a requirement would emasculate the Rule. Any successor could avoid continuation of the action by the simple device of refraining from formally repeating the threat. This would give the successor the option of abating the action

merely by remaining silent, although as here his enforcement policy remains the same as that of his predecessor and therefore in actual fact the threat to appellees remains precisely the same as before.

That this is the proper construction of the Rule is demonstrated not only by its terms but also by its history. Dean Charles E. Clark, a member of the Advisory Committee on the Federal Rules of Civil Procedure, speaking of the purpose of the sentence quoted above, said (Fed. Rules of Civ. Procedure and Proceedings of the A.B.A. Institute, Cleveland (1938), p. 267):

> The next sentence is an attempt to get away from the effect of one case, *Ex parte La Prade* (289 U.S. 444, 77 L. ed. 1311, 53 Sup. Ct. 682 (1933)), to provide that when the new officer comes in and has taken essentially the same position, substitution may then be made in the original action. Under the case, if an injunction was brought against public officer, X, to enjoin him from carrying out a statute claimed to be unconstitutional, and he should go out of office, the suit would not be in form to continue against the new public officer, Y, so we here provide: "Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States."

Even the *Ex parte La Prade* case referred to by Dean Clark did not hold that a specific threat by the successor is necessary for substitution. It held only that reliance may not be placed solely on the fact that it is the duty of the successor to enforce the statute. Thus the Court there said (289 U.S. at 458):

> Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitu-

> tional and that, having regard to his official oath, he rightly may refrain from effort to enforce it.

The incontrovertible allegations in the instant case demonstrate, however, that Mr. McGranery both intends to enforce the statute and considers it constitutional. Consequently even the *La Prade* rule is fully satisfied here.

This construction of the Rule is further supported by the decision of this Court in *Allen* v. *Regents*, 304 U.S. 439. There the Regents had brought a personal action to restrain the Collector of Internal Revenue from enforcing a tax statute on the ground that it was inapplicable or unconstitutional. Pending review a new Collector took office. The application for substitution alleged only that the Collector of Internal Revenue had established a policy of applying the tax statute to situations of the kind involved in that case, that the policy was binding on all Collectors, and that therefore the new Collector "adopts the attitude of his predecessor and will proceed to enforce said policy."* There

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* The full text of the application for substitution taken from the record in that case is as follows:

Come now Regents of the University System of Georgia, appellee in this case, and respectfully show to the Court the following:

1. Within six months next preceding the filing of this application the appellant herein, W. E. Page, has departed this life.

2. Marion H. Allen has been appointed Collector of Internal Revenue of the Atlanta, Georgia, District, and is now fulfilling his duties as such.

3. Appellee desires, pursuant to 28 U. S. C. #780, to substitute Marion H. Allen in place of W. E. Page.

4. Appellee further shows that the policy of attempting to enforce the Federal Amusements Tax on admissions charged to athletic contests given by appellee is a policy established by the Commissioner of Internal Revenue, and is under departmental practices and regulations binding on all Collectors.

5. Appellee therefore says that Marion H. Allen is required to follow said policy, and hence adopts the attitude of his predecessor and will proceed to enforce said policy with respect to applying the Federal Amusements Tax to the said admissions.

was no allegation of any specific, separate, and direct threat by the successor. Over the objection of the successor, the Supreme Court held that substitution was warranted under Section 11 of the Judiciary Act of 1925 (from which Rule 25(d) was taken) and said (p. 445):

> The motion to substitute the petitioner asserted that, unless restrained, he would continue in the course pursued by his predecessor. The answer did not deny this allegation but relied upon the claim that the present Collector is not privy to the acts of the former one. In *Ex parte La Prade*, 289 U.S. 444, this court reserved the question whether in such a situation the successor might be substituted. As the present case is within the letter of the Act and within the inconvenience intended to be obviated by its adoption, the substitution was properly permitted.

Certainly the indisputable facts set forth in the motion above are more than adequate to warrant substitution under this ruling in the *Regents* case.

We further submit that the facts alleged above—even those which are incontrovertible and which may be judicially noticed—are not only enough to satisfy the requirements of Rule 25(d), but would even be enough to warrant the bringing of an action against Mr. McGranery as an original defendant. Those facts demonstrate that he adopts the same views as his predecessors with respect to interpretation and constitutionality, considers the Act to be both applicable to appellees and valid, and is enforcing it. This Court has in a number of cases either expressly or impliedly held that under such circumstances, where the law enforcement officer has taken the position that a statute is both constitutional and applicable to a party, that party may sue to enjoin enforcement without any showing of a specific, direct, melodramatic threat.

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* (cont'd) Wherefore, appellee prays that the said Marion H. Allen be substituted in place of the said W. E. Page, herein, and the Court permit this cause to be continued and maintained with the said successor in office so substituted.

For example, in *Currin* v. *Wallace*, 306 U.S. 1, affirming *Wallace* v. *Currin*, 95 F. 2d 856 (C.C.A. 4), and reversing *Currin* v. *Wallace*, 19 F. Supp. 211 (E.D. N.C.), tobacco warehousemen brought suit for declaratory relief and injunction against enforcement of the Federal Tobacco Inspection Act on the ground that it was unconstitutional. The Act authorized the Secretary of Agriculture to designate tobacco markets at which the Act was to apply, and thereafter no tobacco was to be sold at those markets until inspected and certified by his representatives. The warehousemen instituting the action did business at one of the markets so designated. It was clear that the enforcement officials considered the Act constitutional, and also that the Act was applicable to the warehousemen who brought the action. No reference was made in any of the opinions to any specific, direct threat to prosecute those particular warehousemen if they violated the Act. Nevertheless, both the Court of Appeals and this Court held that they had standing to bring the action.

In *Euclid* v. *Ambler Co.*, 272 U.S. 365, a land owner brought suit to enjoin enforcement of a local zoning ordinance enforceable by criminal penalties on the ground that it was unconstitutional. Plaintiff alleged only that the ordinance was being enforced in accordance with its terms and that its mere existence and threatened general enforcement destroyed the marketability of his land. There was no allegation of a specific threat to prosecute plaintiff for violation of the statute. A motion to dismiss was made in the trial court on the ground that the suit was premature because plaintiff had made no effort to obtain a building permit or to apply to the zoning board for relief as permitted by the ordinance. The Supreme Court held that the motion was properly overruled and said (p. 386, emphasis supplied):

> The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses;

> and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, *the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it.* Under these circumstances, the equitable jurisdiction is clear.

Carter v. *Carter Coal Co.*, 298 U.S. 238, involved suits to enjoin enforcement of the Bituminous Coal Conservation Act of 1935. The Act imposed a 15% tax on the sale of all bituminous coal with a 90% drawback to producers who accepted the code provisions promulgated under the Act. Suits to enjoin enforcement of the Act were brought before formulation of the code, and of course before any specific threat to enforce the Act or the code. The Supreme Court rejected the contention that the suits were premature, saying (p. 287):

> That the suits were not prematurely brought also is clear. Section 2 of the Act is mandatory in its requirement that the commission be appointed by the President. The provisions of Section 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15% is definitely imposed, and its exaction certain to ensue.

To the same effect are *Pierce* v. *Society of Sisters*, 268 U.S. 510, and *Adams* v. *Tanner*, 244 U.S. 590, where suits to enjoin enforcement were brought before the statutes became effective and therefore before there could have been any specific threat to enforce them against the complaining parties.

Similarly, the lower federal courts have frequently held that it is enough if the law enforcement officer has taken the position that the statute is valid and applicable to plaintiffs, and there is no need to show a specific and direct threat to institute proceedings. *Black* v. *Little*, 8 F. Supp. 867 (E.D. Mich., 1934), cited with approval in *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145, 149 (C.C.A. 5),

cert. den. 298 U.S. 688; *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 152 (S.D. Fla., 1937); *Sunshine Mining Co.* v. *Carver*, 41 F. Supp. 60 (D. Idaho 1941); see also Borchard, *Declaratory Judgments* (2d ed.), pp. 43, 62, 276, 966.

We submit therefore that the facts alleged in the motion —even those which are incontrovertible and may be judicially noticed—clearly demonstrate that substitution under Rule 25(d) is warranted here. Those facts show beyond question that Mr. McGranery adopts and continues the action of his predecessors in enforcing the Lobbying Act, which is all that the Rule requires. Moreover, those facts show that he has adopted precisely the same views as his predecessors with respect to the constitutionality, applicability, and interpretation of the statute, is continuing to enforce the Act, and believes it to be applicable to appellees and valid. Under the decided cases this is not only enough to warrant substitution under the provisions of Rule 25(d) but would even support the institution of an action against Mr. McGranery initially.

For these reasons it is submitted that this motion to substitute Mr. McGranery for Mr. McGrath should be granted.

Respectfully submitted,

Carl McFarland,
Ashley Sellers,
Raymond S. Smethurst,
Kenneth L. Kimble,
Counsel for Appellees.

October 1952.

Office - Supreme Court, U.S.
FILED
OCT 28 1952
HAROLD B. WILLEY, Clerk

No. 174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

J. HOWARD MCGRATH, ET AL., *Appellants*,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees*.

Appeal from the United States District Court for the District of Columbia

---

PETITION FOR REHEARING

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

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INDEX.

Page

The Circumstances here are Fundamentally Different from those in *Snyder* v. *Buck* in that here Timely Motions to Substitute have been Filed and the Time for Substitution has not even yet Expired .. 2

If the Court's Decision is Grounded on the Alleged Error of the District Court in Entering the Judgment against Mr. McGrath, the Dismissal of the Complaint as Moot is Erroneous for the Reason that such an Error would not render the Case Moot or Provide the Basis for Denying us the Right to Substitute, and for the Further Reason that the Action of the District Court in this Respect was Proper 6

No Matter what the Basis of the Decision, It is Fundamentally Erroneous in that it Overlooks the Fact that Timely Substitution Motions have been Filed, and Further in that it Wipes out the Statutory Right of Substitution 12

Conclusion 13

CITATIONS.

Cases.

Allen v. Regents, 304 U. S. 439 5
Bell v. Bell, 181 U. S. 175 11
Davis v. Preston, 280 U. S. 406 .....3, 4, 13
Fleming v. Mohawk Co., 331 U. S. 111 5
Mitchell v. Overman, 103 U. S. 62 11
Quon Quon Poy v. Johnson, 273 U. S. 352 11
Snyder v. Buck, 340 U. S. 15 .....2, 3, 4, 5, 6, 11, 13

Statutes.

Act of February 8, 1899 (30 Stat. 822) 3
Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941) 3

Miscellaneous.

Stern and Gressman, *Supreme Court Practice* (1950), p. 344 5

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PETITION FOR REHEARING

On October 13, 1952, this Court entered a *per curiam* order vacating the judgment below and remanding the case to the district court with directions to dismiss the complaint upon the ground that the case is moot. Appellees respectfully petition the Court to reconsider that decision.[1]

[1] Under Rule 34 of the Rules of this Court, the mandate in this case will issue on November 8, 1952. We do not expect the Court will rule on this petition until November 10, 1952. We therefore respectfully move the Court to stay its mandate herein until it has ruled on this Petition for Rehearing.

We do not know the specific reasons which motivated the Court to reach this result. The opinion states no reasons except to cite *Snyder* v. *Buck*, 340 U.S. 15. Appellants' motion to vacate, on the other hand, appears to be based on the contention that the district court erred in entering the judgment *nunc pro tunc* against Mr. McGrath after his resignation. We can only conclude, therefore, that the decision is based upon one of those two grounds.

We contend: (1) That *Snyder* v. *Buck* has no application here because that decision rests entirely upon the fact that neither side had filed a timely motion to substitute, whereas here both sides have filed timely substitution motions. (2) That the order of this Court cannot properly be based on the alleged error of the court below in entering the judgment against Mr. McGrath because, even if that was error, it could not render the case moot or deprive us of our statutory right to move to substitute within six months. (3) That no matter what the rationale of this Court's decision, it is erroneous for the fundamental reason that it overlooks the fact that timely substitution motions have already been filed, and further denies the right to substitute when the time for substitution has not yet expired. We discuss these points in more detail below.

The Circumstances Here are Fundamentally Different From Those in Snyder v. Buck in That Here Timely Motions to Substitute Have Been Filed and the Time for Substitution Has Not Even Yet Expired.

The *Snyder* case involved a mandamus action to compel the Paymaster General of the Navy to pay a widow's allowance. The district court rendered judgment for the plaintiff; shortly thereafter the defendant retired and was succeeded in office; after such retirement notice of appeal to the Court of Appeals was filed in the name of the retired officer. Neither party filed a motion to substitute within the six-month period. This Court affirmed a ruling of the Court of Appeals vacating the judgment below and direct-

ing dismissal of the complaint. It held that Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941) made survival of the action dependent on a timely substitution, and therefore where there was a failure to move for substitution within the statutory period the action abated and the complaint must be dismissed, requiring the plaintiff to start over.[2] The Court pointed out that the retiring government officer had no right to obtain review, but held that even though the appeal was faulty the Court was required to dismiss the complaint because passage of the six-month period made it impossible to substitute the successor. In that connection it distinguished *Davis* v. *Preston*, 280 U.S. 406, where a similarly faulty appeal had been taken but there remained time in which to substitute the successor in the court below. The Court said (340 U.S. at p. 21):

> Therefore, on remand of the cause in the *Davis* case the successor Federal Agent could be substituted and the judgment enforced against him. On remand of the present cause there would be no way of substituting the successor, as the suit had abated in the District Court. Vacating the judgment of the District Court was therefore the proper procedure.

Thus, two points clearly emerge from the *Snyder* opinion. First, the judgment was vacated and the complaint dismissed there *only* because neither side had filed a timely motion to substitute. Second, since the appeal was faulty, the Court would have dismissed the appeal rather than the complaint if there had remained time to substitute below. In the instant case the circumstances are precisely the opposite. Here both sides have filed timely motions to

[2] The court distinguished the situation under the earlier Act of February 8, 1899 (30 Stat. 822), which had provided that in such a case the action should not abate and had fixed a period within which substitution could be made. The Court said that under that statute passage of the period for substitution merely resulted in the proceeding being "at an end" so that the proper procedure was to dismiss the appeal and leave undisturbed the judgment below.

substitute. Moreover, there remains time in which to file such a motion in the district court.

Applying that decision to the facts here, the situation is as follows. Under the *Snyder* case (as well as the *Davis* case) Mr. McGrath had no standing to seek review. The reason is that he no longer is responsible for enforcement of the Lobbying Act, all such responsibility and with it the right to take this appeal having passed to his successor. Appellants recognized this problem and therefore moved to substitute Mr. McCranery. We did not contest that motion. Unless the *Davis* and *Snyder* cases are to be overruled in this respect, appellants' motion to substitute Mr. McGranery must be granted to give them any standing in this Court. This would seem to be true with respect to the alleged error in entering the judgment against Mr. McGrath the same as all other alleged errors, for it is nothing more than one of several errors assigned by appellants to be heard on the appeal, and Mr. McGrath's interest in that alleged error is no different from his interest in any other. If that motion is granted, then the case cannot of course be moot. The order of the Court does not indicate any ruling on appellants' motion to substitute, and we must assume therefore that it decided the case on Mr. McGrath's appeal. Such action is squarely inconsistent with the principle established by the *Davis* and *Snyder* cases.

Out of an abundance of caution, however, we filed on October 2, 1952, our own motion to substitute Mr. McGranery, requesting that it be considered only if the Court did not grant appellants' motion. We attached this condition because we felt that under the decided cases it was the obligation of appellants to substitute Mr. McGranery if their appeal was to be heard, and we could see no reason for undertaking an obligation which did not rest upon us. We made the motion, however, in order to protect ourselves in all eventualities. That motion is timely and, if Mr. McGranery is not to be substituted on appellants' motion, we believe we have a right to be be heard on our motion. So

far as we can tell from the order of the Court, our motion has not been ruled upon. It appears, therefore, that we have been denied a hearing on our timely motion and thereby have been deprived of our statutory right to substitute.[3]

In addition, we are filing herewith a motion to substitute under Rule 25(d) of the Federal Rules of Civil Procedure. In our earlier motion we requested that it be considered only if this Court's Rule 19(4) is deemed still effective, and said that we would file a subsequent motion under Rule 25(d). We think it clear that since the statute referred to in Rule 19(4) has been expressly repealed, that Rule no longer has any effect and Rule 25(d) now governs substitution in this Court. This Court has strongly indicated as much. See *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 119; *Snyder* v. *Buck*, 340 U.S. 15, 17, fn. 2. Under Rule 25(d) we have until November 27, 1952 in which to move to substitute. Hence this motion is timely. Moreover, it alleges facts which are incontrovertible and subject to judicial notice, and which are clearly sufficient to warrant substitution under Rule 25(d). Therefore, if substitution is not to be granted on either appellants' motion or our earlier motion, we think it clearly must be granted on the motion filed herewith.

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[3] In their memorandum in opposition, appellants contended that our motion should be denied because it was not accompanied by proof of the facts alleged therein. It is clear, however, that a simple allegation of the ultimate facts is enough. Stern and Gressman, *Supreme Court Practice* (1950), p. 344. And where such an allegation is not denied, as it was not here, substitution should be granted. *Allen* v. *Regents*, 304 U. S. 439, 445. Certainly we should not be required to submit our proof unless and until the allegation is denied by appellants. We have stated in our reply brief in support of the motion that we are prepared to make such proof if that should be necessary. Under the circumstances, it is inconceivable to us that the Court would deny our motion on this ground. Moreover, the order of the Court in no way indicates that this motion has been denied. Consequently we have on file a timely motion to substitute which, in our opinion, must be considered by the Court, and if it is granted the case cannot become moot.

We submit, therefore, that the situation here is just the reverse of that in the *Snyder* case. There no one had filed a motion to substitute, the six-month period had expired, and consequently the case had abated. The Court clearly indicated that under any other circumstances it would have permitted the plaintiff to preserve the judgment below. In this case, timely motions have already been filed to cover all contingencies, and the six-month period has not yet expired. Consequently the case cannot possibly have abated. Nor can the case become moot unless those motions are denied. Since the motions have not yet been passed upon, the case obviously is not now moot.

If the Court's Decision is Grounded on the Alleged Error of the District Court in Entering the Judgment Against Mr. McGrath, the Dismissal of the Complaint as Moot is Erroneous for the Reason That Such an Error Would Not Render the Case Moot or Provide the Basis for Denying us the Right to Substitute, and for the Further Reason that the Action of the District Court in this Respect Was Proper.[4]

Assuming the district court erred in entering the judgment against Mr. McGrath after his resignation (which

[4] This Court's citation of *Snyder* v. *Buck* would indicate that its ruling is not based on the alleged error in entering the judgment *nunc pro tunc*. The *Snyder* case does not hold that it is improper to enter a judgment *nunc pro tunc* against an officer who has resigned; the district court judgment there was not entered *nunc pro tunc* but was entered before the officer's resignation. It does not hold that such entry, assuming it to be error, renders the case moot and requires dismissal of the complaint; the complaint there was dismissed solely for the reason that the case had abated for failure to file a timely motion to substitute. It does not hold that such entry, assuming it to be error, wipes out appellees' statutory right to substitute the successor upon a timely motion; there was no timely motion in that case. Thus the *Snyder* case deals with none of the questions which are pertinent if this alleged procedural error is the basis of this Court's ruling. We discuss the point here, however, because it appears to have been the ground asserted in appellants' motion to vacate, which this Court granted.

we deny), such an error is manifestly not a proper ground for declaring the case moot, or for dismissing the complaint and thereby depriving appellees of their statutory right to move within six months to substitute Mr. McGranery.

The case obviously did not become moot for all purposes upon Mr. McGrath's resignation. There still remained the six-month period for substitution. The very purpose of the substitution Rule is to prevent the automatic abatement of cases and the requirement that plaintiffs start over in such instances. To hold that the case became moot upon Mr. McGrath's resignation and that the complaint should therefore be dismissed would be a complete subversion of that Rule. Under the Rule the case does not abate and the complaint cannot be dismissed as moot unless no motion is filed within the six-month period, or unless such a motion is denied on the ground that substitution is not warranted.

It may be suggested that the case became moot as to Mr. McGrath upon his resignation, although there remained the right to substitute Mr. McGranery. But certainly that can provide no basis for dismissing the complaint in its entirety. The very purpose of the Rule is to keep the case pending for six months to permit the parties to substitute if the facts warrant. To dismiss the complaint because the case became moot as to the predecessor without waiting for expiration of the six-month period in which to move to substitute the successor is nothing less than repeal of the substitution Rule.

Consequently appellees have a statutory right to move within six months to substitute Mr. McGranery unless something has happened in this case to deprive them of that right. The only thing that has occurred here is the entry of the judgment *nunc pro tunc* against Mr. McGrath. It may be the theory of the Court that the case became moot as to Mr. McGrath when he resigned, and that therefore it was error to enter the judgment against him. But even assuming that procedure to have been erroneous, it cannot possibly have the effect of abating the case, of ren-

dering it moot for all purposes so as to require dismissal of the complaint, or of depriving appellees of their right to move within six months to substitute Mr. McGranery.

A case abates only if no motion to substitute is filed within the six-month period. Entry of the judgment against Mr. McGrath cannot shorten that period and cause the case to abate at an earlier date.

A case such as this becomes moot only if it has abated for failure to file a timely motion, or if the requirements of the Rule on substitution cannot be met so that such a timely motion must be denied. Under the Rule, substitution is permitted if it can be shown that the successor adopts or continues the action of his predecessor in enforcing a law averred to be unconstitutional. The alleged procedural error can have nothing to do with the existence or non-existence of such facts. Even though it be assumed that the case became moot as to Mr. McGrath, it is not moot as to Mr. McGranery if the necessary facts can be proved. And the alleged procedural error cannot make the case moot as to Mr. McGranery or deprive appellees of their right to prove those facts.

Nor can this alleged error have one effect of denying to appellees the right to substitute granted by the Rule. That of course would be the result of the order directing dismissal of the complaint. Appellees have filed timely motions under both Rule 19(4) and Rule 25(d). Those motions have not been heard. Moreover, the time to file such a motion under Rule 25(d) has not even yet expired. Yet the order of the Court would require plaintiffs to start their case over without ever having the opportunity to take advantage of the substitution Rule. Certainly there is nothing in the alleged procedural error which requires this result. There is nothing in that error which demands or permits nullification of that statutory right.

The alleged error may be readily corrected without any such result. At the time the judgment was entered below, the court had the alternative of requiring substitution

before entry, or of entering the judgment *nunc pro tunc* against Mr. McGrath. The court chose the latter procedure. If that was error, it may be fully remedied by requiring substitution now. Thus if this Court should hear appellees' motions and rule that the requirements have been satisfied, the error in the *nunc pro tunc* entry has been entirely eliminated. If the Court should prefer to have the matter heard by the district court, the judgment may be vacated and the case remanded to that court for such consideration. But in no event should the complaint be ordered dismissed. Appellees are entitled to the six-month period within which to file their motion and, after filing, are entitled to have their motion heard. This Court's direction that the complaint be dismissed improperly deprives appellees of these rights, and is under no circumstances necessary to bring about correction of the alleged error.

Moreover, we wish to set forth here at least in summary fashion our reasons for believing that the *nunc pro tunc* procedure was correct. That question has never been briefed in this Court. Appellants have contented themselves with stating simply that the *nunc pro tunc* procedure was not appropriate here. Since that was one of the errors assigned on their appeal and since they did not argue the point in detail in the motion papers, we concluded that we should not do so. Now that it appears, however, that the Court may have ruled as it did on the theory this procedure was erroneous, we desire to summarize our reasons for thinking such procedure to be correct.

In this connection certain circumstances should be made clear. In its written opinion filed on March 17, 1952, the district court reached all of its ultimate conclusions on both the facts and the law, and at the end thereof concluded: "A permanent injunction against the prosecution of the plaintiffs for violations of any provision of Sections 303 to 307, inclusive, is granted." (See Opinion in Statement as to Jurisdiction, p. 25.)

The uniform practice in this district court calls for the prevailing party to prepare for the court's assistance find-

ings of fact, conclusions of law, and judgment; to show these papers to opposing counsel; and then to submit them to the court. Appellees' counsel sought to show these papers to counsel for appellants on March 31, 1952, but he was out of town and not expected to return until April 2. After consulting with the court, it was decided that the papers should be held until his return. On April 2, counsel for appellees learned that counsel for appellants would not return until on or about April 4. After again consulting with the court, counsel for appellees on April 2 delivered copies of the papers to the secretary of counsel for appellants and on the same date submitted the papers to the court. Five days later, on April 7, Mr. McGrath resigned. It was not until April 10, 1952, that counsel for appellants informed the court of his position with respect to the papers prepared by appellees.[5]

From this it is clear that the district court reached its final decision on both the facts and the law on March 17, 1952, and the only steps then remaining were the formal ones of entering the findings, conclusions and judgment. Those papers could as well have been entered by the court at the time it rendered its opinion, and they were not so entered only because of the practice in this district mentioned above. It is also clear that these papers could have been filed prior to Mr. McGrath's resignation but for the fact that counsel for appellants was unavailable and did not inform the court of his position until after the resignation of Mr. McGrath.

The decisions of this Court make it clear that under such circumstances it is entirely proper to enter the judgment *nunc pro tunc* as of the date of the opinion. For example, this Court has frequently held that judgment may be entered *nunc pro tunc* as of the date of *argument* where one

[5] These facts are recited in the memorandum which appears in the transcript of record in this case entitled: Plaintiffs' Memorandum in Opposition to Defendant's Memorandum on the Authority of the Court to enter an Order of Injunction against Defendant McGrath Nunc Pro Tunc as of the Date of the Court's Opinion.

of the parties has died between that date and the date of judgment. *Quon Quon Poy* v. *Johnson*, 273 U.S. 352, 359; *Bell* v. *Bell*, 181 U.S. 175, 178-179; *Mitchell* v. *Overman*, 103 U.S. 62, 65. In the last-named case the Court said (at p. 65):

> A *nunc pro tunc* order should be granted or refused, as justice may require in view of the circumstances of the particular case. These principles control the present case. Stutzman was alive when it was argued and submitted. He was entitled at that time, or at the term of submission, to claim its final disposition. A decree was not then entered because the case, after argument, was taken under advisement. The delay was altogether the act of the court. Its duty was to order a decree *nunc pro tunc*, so as to avoid entering an erroneous decree.

The *Quon Quon Poy* case is closely in point. It involved a petition for a writ of habeas corpus directed to the Commissioner of Immigration. The district court had discharged the writ and remanded the petitioner to the custody of the Commissioner. The Commissioner died after the date on which the case was argued on appeal in the Supreme Court, and some time before the decision. The Supreme Court affirmed the judgment of the lower court and directed entry of the judgment *nunc pro tunc* as of the date of the argument. It is true that there the judgment was in favor of the government officer, whereas here the judgment below is for appellees. But if it is appropriate to enter a *nunc pro tunc* judgment in such a case where the government prevails, it must be equally appropriate to enter such a judgment in favor of the private party.[6]

[6] It is also to be noted that the judgment here is not "coercive" and does not require execution, as did the judgment in *Snyder* v. *Buck*, for example. The judgment here is prohibitory and requires no further action by the Court to make it effective. At the time the judgment was entered, neither the Court nor appellees knew whether appellants would appeal, and it was not the obligation of appellees to prepare the case for appeal. The only interest of the

No Matter What the Basis of the Decision, It Is Fundamentally Erroneous in That It Overlooks the Fact That Timely Substitution Motions Have Been Filed, and Further in That It Wipes Out the Statutory Right of Substitution.

To summarize the situation here, there are two rules on substitution—Rule 19(4) of the Rules of this Court and Rule 25(d) of the Federal Rules. Under Rule 19(4) the time for filing a motion to substitute expired October 7, 1952. Under Rule 25(d), the time expires November 27, 1952.

We think Rule 25(d) governs. But whichever rule applies, both sides have filed timely motions. The case cannot abate in such circumstances. Nor can it become moot, so that the complaint should be dismissed, unless the motions are denied. The alleged error in entering the judgment against Mr. McGrath cannot abate the case, render it moot, or elminate the right of substitution. If it was error so to enter the judgment, that is not a ground for directing dis-

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Court and of appellees was to secure the entry of a final judgment carrying out the decision of the Court. If there was to be no appeal, a judgment *nunc pro tunc* against Mr. McGrath would have been as effective as a judgment entered before his resignation. Certainly if the judgment had been entered before he left office and no appeal had been taken, no one would expect appellees to secure the substitution of every succeeding Attorney General to take office in the future. The only occasion for substitution in such a case would be if the government desired to appeal, in which event it would be their obligation to substitute the new Attorney General. The same should be true in this case. If there were to be no appeal, the *nunc pro tunc* judgment against Mr. McGrath would give appellees as effective relief against successors as if the judgment had been entered prior to his resignation. Consequently here, as in any other case, the only reason for substitution was to enable the new Attorney General to take an appeal. That was not appellees' obligation, and they were entitled to proceed as if the judgment in the district court would become final. For this additional reason, it was proper for the court to enter the judgment *nunc pro tunc* against Mr. McGrath, and for the same reason it would seem to be proper to require the appellants to substitute Mr. McGranery if their appeal is to be heard.

missal of the complaint and requiring us to start over below. Such an error can be adequately corrected by permitting us to substitute either here or below. Such substitution wipes out the error and puts the parties in precisely the position they would have been had the judgment not been entered *nunc pro tunc*. Not only is such dismissal of the complaint not necessary to correct the error, but it is a clear denial of appellees' statutory rights. Appellees are entitled to six months in which to move to substitute. They have filed timely motions under both rules and to cover all contingencies. The alleged error of the district court cannot cut short that period, or deprive appellees of their statutory right to substitution upon the proper showing.

CONCLUSION

In conclusion appellees submit: (1) Under the *Davis* and *Snyder* cases appellants are not entitled to review except upon the substitution of Mr. McGranery and consequently their substitution motion must be granted before the Court can consider the case. When that motion is granted the action cannot abate or become moot. Thus the Court should grant that motion and proceed to hear the case on the merits. (2) If the Court disagrees with us in that respect, it should itself rule upon appellees' motions to substitute which have been filed under Rule 19(4) and Rule 25(d). We believe that there are sufficient incontrovertible facts of which this Court may take judicial notice to warrant the granting of these motions. If appellants should deny any of the facts alleged, however, and the Court should desire additional proof, appellees should be given the opportunity to submit such proof by affidavit or otherwise. (3) Finally, if the Court disagrees with both of the contentions stated above, it should in any event strike that part of its order which directs dismissal of the complaint and

remand the case to the district court for consideration of appellees' motion filed herewith under Rule 25(d).

Respectfully submitted,

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

October 1952.

Certificate

I certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

KENNETH L. KIMBLE

No. 174. McGrath, Attorney General, *v.* National Association of Manufacturers of the United States of America et al. Appeal from the United States District Court for the District of Columbia. *Per*

Curiam: The motion to vacate is granted. The judgment is vacated and the case is remanded to the United States District Court with directions to dismiss the complaint upon the ground that the case is moot. *Snyder* v. *Buck*, 340 U. S. 15. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Philip B. Perlman*, then Solicitor General, *Acting Solicitor General Stern*, *Philip Elman* and *Morton Hollander* for appellant. *Carl McFarland*, *Ashley Sellers*, *Raymond S. Smethurst* and *Kenneth L. Kimble* for appellees. Reported below: 103 F. Supp. 510.